IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

THE BRIEF FOR THE UNITED STATES AVOIDS THE PRINCIPAL QUESTIONS RAISED IN THIS PROCEEDING.

A. The Petition For Certiorari Presented Questions, Which Were Raised In The Opinion Of The Court Of Appeals, For Review By This Court. The Brief For The United States Has Mis-stated The Questions Presented In This Proceeding And Distorted The Issues In The Case.

Rule 40(d) (2) provides that the phrasing of the Questions Presented need not be identical with that set forth in the Petition for Certiorari. That rule, how-

ever, further provides that the Brief may not raise additional questions nor change the substance of the questions already presented. In the Brief For The United States the Respondent has totally disregarded the Questions Presented for review by the Petition for Certiorari, (Petn. 3), and the Opinion of the Court of Appeals for the Seventh Circuit (App. 19-20). The Questions presented were never changed through the course of the seven briefs prior to the Respondent's Brief. The Court of Appeals even recited the questions as presented to it. We note additionally that no objection to the presentation of questions before this Court was raised in the Memorandum For The United States In Opposition to the Petition for Certiorari.

The first Question Presented by the Petitioner is as follows:

> "Whether the *total absence* of any questioning of Petitioner by the District Court prior to sentencing as to Petitioner's understanding of the nature of the charges against him is a compliance with Rule 11 of the Federal Rules of Criminal Procedure." (P. Br. 2) (Italics ours).

In the Brief For The United States the Respondent has changed not only the phrasing of the question, but also its substance. The statement of the question presented in the Brief For The United States is as follows:

> "Whether the record shows that petitioner's plea of guilty was entered voluntarily, with knowledge of the nature of the charge and the consequences of the plea, and contains sufficient assurances that a factual basis existed for the guilty plea." (U. S. Br. 2)

This is a misrepresentation, and it is not the only misrepresentation in the Brief For The United States. It sets a framework for those that follow.

The paramount duty of a prosecutor is accuracy and truth. The record shows a *complete absence* of questioning of Petitioner as to the nature of the accusation. The Respondent recognized in its Memorandum (in opposition to Petition for Certiorari) at page 3 that no questions were asked of Petitioner as to his understanding of the crime charged. Now the Government has changed the substance of the issue before the Court. The Government should answer the *questions fairly presented.* The Government should martial its arguments in answer to *arguments actually made.* Instead the Government has avoided the issues arising from the facts of *this case.* Such procedures are unfair to the Petitioner and do a genuine disservice to the principles underlying our system of judicial review.

The new statement of the issue by the Respondent totally distorts the first question actually presented in this proceeding. Additionally, the Respondent has improperly interpreted the issue and the argument of Petitioner on this matter. At page 14 of the Brief For The United States is the following passage:

> "*It is claimed,* however, that before accepting the plea, the Trial Judge did not *sufficiently* inquire into the Petitioner's understanding of the nature of the charge against him. Undoubtedly the Judge *could have been more explicit* in this respect". (Italics ours).

Such a statement is a complete and patent misrepresentation. The *claim* of the Petitioner, and the *fact* disclosed by the record, is that the Trial Judge *did not inquire* into the Petitioner's personal understanding of the charge, *at any time, in any way.* (P. Br. 12, 14, 17, 19, 23, 34.)

The Brief For The United States does not contain the second Question Presented in the Petition for Writ of Certiorari, the Opinion of the Court of Appeals, and the Brief for the Petitioner. That question is as follows:

> "Whether the District Court abused its discretion by entering a judgment of conviction after it knew or should have known that Petitioner did not understand the nature of the charge". (P. Br. 2).

The Government Brief is silent as to the presentation of that question which was briefed and argued, orally and in writing, in the Court of Appeals. The question was put in the same form in the Petition For A Writ Of Certiorari, and was not disputed by the Memorandum For The United States In Opposition. Note should also be made that the Respondent has argued vigorously in its brief that Amended Rule 11 "preserves" a "desirable degree" of *discretion* for the trial judge (U. S. Br. 14). In view of this position, the Respondent's failure to direct its attention to the question as raised by Petitioner and to answer the arguments of Petitioner is clearly non-responsive and apparently intentional.

The Government Brief also fails to recognize the third Question Presented which is founded upon the Fifth and Sixth Amendments to the Constitution. That question is absent from the Government's Brief and the only reference in that Brief to the United States Constitution is in footnote 13 (U. S. Br. 23-24).

The Respondent's failure to recognize The Questions Presented and to discuss them raises a substantial question whether the Respondent has met the grounds of this proceeding or has abandoned its opposition to the arguments of the Petitioner on those questions.

B. The Brief For The United States Has Volunteered A New Question In Violation Of The Rules Of This Court.

In addition to mis-stating the Questions Presented, the Respondent has manufactured a new question which it has denominated as Question 3 (U. S. Br. 2). For the first time since the Appellate proceedings began in this case, the Government has raised a question as to whether the case should be *remanded* to determine whether the guilty plea was voluntarily and knowingly entered. Raising such a question for the first time before this Court is not an acceptable procedure. In similar situations this Court has clearly indicated that it will uphold Rule 40(1)(d)(2) of the Rules of this Court and will consider only the questions decided below and brought before the Court through Appellate proceedings or by Petition for Writ of Certiorari. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

C. The Brief Of The United States Has Mis-stated The Facts Shown In The Record And Has Made Totally Unwarranted Inferences From The Record.

Throughout the Brief For The United States references to the record before this Court are misleading, when they are present, and are totally wanting in most cases.

In the Summary of Argument (U. S. Br. 6) the Respondent makes the following statement:

> "From the time of indictment petitioner was represented by able and experienced counsel who engaged in *numerous conferences* with petitioner apparently over the issue of wilfulness since his tax liability was never publicly disputed." (Italics ours).

No reference to the record is made at this point nor at any point in the Argument, nor at any time in the Brief, to support such a statement. The simple fact is that *the record does not disclose that any conferences were held;* nor does the record indicate that the element of wilfulness was ever mentioned to the Petitioner. The thrust of the Argument in the Brief For Petitioner is that the record, far from disclosing any discussion of wilfulness, actually raises grave doubts as to whether or not the elements of the crime were correctly interpreted in the statement of counsel for the Petitioner in the District Court.

It must be expected that Petitioner and Respondent will interpret the record differently. Certain statements of Respondent and the record bases for such statements, however, cannot go unnoticed, such as the following:

> "While he [defense counsel] phrased it to the Court in terms of the neglect being so gross as to become criminal (App. 14) he had *obviously* concluded that a defense of lack of wilfulness could not be sustained and had so *advised* his client." (Italics ours). (U. S. Br. 10)

The Government's reference to the Appendix does contain a statement by counsel as to neglect. The inference drawn from that statement of counsel is totally unwarranted. The record reference is as follows (App. 14):

> "Mr. Sokol: *He did not act in contemplation of avoiding taxation.* That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please.
>
> I could not have, in good conscience, recommended that he go into a plea *if I did not feel that neglect has become criminal* when it reaches a certain stage.

> But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—"

How can the Government possibly construe that statement of counsel, which is evidently the record reference used to support its conclusion, to exhibit an *obvious* conclusion that counsel had *advised* his client on the issue of wilfulness? Surely there is nothing in that statement to support such a conclusion. The best that can be said of the foregoing statement of counsel is that it raises many more questions than it answers.

It is significant to note at this point that the Government has failed to recognize and answer the Argument made by the Petitioner that the District Court, when faced as it was with an incorrect statement of the elements of the crime under section 7201, had an *affirmative duty to inquire further*. The District Court did not inquire further and such failure is an abuse of discretion.

Another patent example of the Government's cavalier attitude towards accurate reference to the record is as follows:

> "The question whether petitioner would plead guilty had *obviously* been under *discussion* for some time for, on June 29, more than two weeks before he entered his plea *government counsel* indicated that a trial might not be necessary. Since petitioner's tax liability was never publicly disputed any discussions with respect to a plea between petitioner and his attorney necessarily related primarily to the element of *wilfulness*, which would have presented the *only real issue at the trial.*" (Italics ours). (U. S. Br. 9-10).

The Government does not cite any record reference for these conclusions. The only clue to the place in the record where the Respondent might claim justification for this statement is the reference to Government Counsel and the necessity for a trial. The colloquy at which Government counsel spoke about a trial is as follows:

> "Mr. Galbraith: Good morning, your Honor. This is the matter that I discussed with you the other day and it arises out of the defendant's illness. This is an income tax case.
> "The Court: How long will the trial take?
> "Mr. Galbraith: Well, it is anticipated the matter will not go to trial, according to counsel.
> "The Court: When is it set for?
> "Mr. Galbraith: It is presently set for tomorrow. We are asking it to be set July 15th.
> "The Court: That will be the order." (App. 5)

Furthermore the fact that *Government Counsel* informed the Court of *Petitioner's illness,* and the additional fact that defense counsel was not even present, raise a number of unanswered questions which the Respondent has carefully avoided.

The Respondent's admission that wilfulness would present the only real issue at the trial reinforces the argument made by the Petitioner as to the affirmative duty of the Court to inquire on that subject. But the inference drawn by the Government that discussions had taken place on the issue of wilfulness is an extreme assumption which can find no basis in the record.

II.

THE BRIEF FOR THE UNITED STATES HAS MISINTERPRETED THE APPLICABLE RULE.

A. Rule 11 Is Mandatory.

The Brief For The United States, in speaking of Rule 11, states:

> "It *simply directs* the Judge to address the Defendant personally and determine the voluntary and knowing nature of his guilty plea before accepting it." (Italics ours). (U. S. Br. 14)

Subsequently the Respondent speaks of the "general requirements" (U. S. Br. 15), "generalized mandate" (U. S. Br. 16) and "general standards" (U. S. Br. 20). The Respondent's implication is that Rule 11 is really advisory in nature. Such a characterization of Rule 11 of the Federal Rules of Criminal Procedure, is simply incorrect. Numerous cases have specifically held for many years that Rule 11 is *mandatory*. The controlling case in the Seventh Circuit is *United States* v. *Davis*, 212 F. 2d 264 (C.A. 7, 1954) where the Court, referring to Rule 11, said at page 267:

> "This Rule is stated in *mandatory* language and the court is not relieved of the *duty* which it imposes solely because the accused, as here, is represented by counsel of his choice. The rule is simply and concisely stated, and it makes no such exception." (Italics ours)

The Government Brief cites as authority for the proposition that Rule 11 is *directory only*, and that Rule 11 preserves a desirable degree of flexibility and discretion for trial Judges, the *Lowe* case. (U. S. Br. 14-15). However, the Brief For The United States, which abounds in footnotes, has failed to attend to the single footnote in that case which reads as follows:

"Rule 11, Fed. R. Crim. P., as amended February 28, 1966, and effective July 1, 1966, now contains the *express requirement* that the court *address the defendant personally* in determining that the plea is made voluntarily with *understanding* of the nature of the charge. The Advisory Committee's Note to the amended rule makes clear that personal interrogation of the defendant on this matter by the court is now *required*, even though he is represented by counsel, and counsel or the government attorney has attempted to explain the nature of the charge and the consequences of the plea." *United States* v. *Lowe*, 367 F. 2d 44, 45 (1966) (Italics ours).

The wording of Rule 11 is plain and concise. The rule states that the Court "*shall not accept*" a plea of guilty, and further states that the Court "*shall not enter judgment* upon a plea of guilty." (App. 31). This language is mandatory and any attempt to characterize it as anything less should be disregarded.

B. The Burden Of Proof Is On The Respondent And That Burden Has Not Been Met.

The authorities are clear and unanimous on the question of the ultimate burden of proof. The Government has the burden of proof on the question of whether or not the plea was made voluntarily and knowingly. *Lane* v. *United Sates*, 373 F. 2d 570, 573 (C.A. 5, 1967). The Respondent changes that burden in its brief. The Government admits that it has the burden, but defines that burden as a showing that ". . . no *fundamental error* resulted from the trial judge's failure to comply literally with the rule." (U. S. Br. 20). (Italics ours)

Even if we assume for the sake of argument that the Respondent's definition of its burden is accurate, sev-

eral questions remain. Does the Government admit that error was committed in the failure of the District Court to comply with the terms of Rule 11? (In its Memorandum, at page 3, the Respondent recognized that the Court had not expressly questioned Petitioner as to his understanding of the charge.) Why doesn't the Respondent then go on to show that no fundamental error resulted?

The answers to these questions are simple. There was a *failure to comply* with Rule 11, and *fundamental error did result.* Petitioner is faced with a jail term and a fine, but there is nothing in the record to show that he understood, or was informed of the charge. This kind of error is indeed fundamental.

C. The Alternative Methods Suggested By The Respondent Exemplify The Constitutional Position And Arguments Of The Petitioner.

The alternatives faced by Petitioner, and others similarly situated, are rather narrow. The Government suggests that a motion to vacate sentence under 28 U.S.C. 2255 is an "accepted and usual" method of questioning a conviction based on a guilty plea. (U. S. Br. 22). The Government cites in support of this contention *8 Moore's Federal Practice* Par. 11.04. That authority points out the serious difficulty in a motion to vacate. As Professor Moore puts it: "The statute requires that defendant requesting relief be *in custody* under the challenged sentence." (*ibid.*) (Italics ours)

The second suggestion of the Government is the other "accepted and usual" approach, namely, a motion to withdraw a guilty plea under Rule 32 (d) (U. S. Br. 22). If such a motion is made after sentence is imposed,

as in the present case, an extremely heavy burden is placed on the Defendant. In the same paragraph cited above, and used by the Government as authority, Professor Moore says: "As a practical matter the scope of relief under Rule 32 (d) is narrow since *defendant must ordinarily demonstrate his innocence* of the charge in order to withdraw the plea." (*ibid.*) (Italics ours).

Thus the two alternatives for a Defendant, in the situation faced by Petitioner, are:

1) go to jail and move to vacate the sentence;
2) Move to withdraw the plea and assume the burden of proving innocence.

In either of these situations, Petitioner would be seriously prejudiced as a direct result of the error in the District Court. If the burden were changed, as Professor Moore suggests, so that in order to present a motion to withdraw his plea Petitioner had to demonstrate his *innocence*, then the Fifth Amendment rights of Petitioner are meaningless. On the other hand, in order to retain the presumption of innocence on his behalf, Petitioner would have been forced to submit to imprisonment before he could raise any question as to his rights under the Sixth Amendment by way of a motion to vacate sentence.

It is therefore clear that a failure to comply with Rule 11 is a serious Constitutional violation. In spite of this, Respondent has failed to recognize or to argue the Question Presented on this issue. Any order other than a reversal of the conviction will put Petitioner back into the dilemma suggested above.

D. Even Before The Amendment To Rule 11, The Burden On The Government Was Clearly Defined And Understood.

In its Brief, the Respondent cites authorities to support the proposition that the test under Rule 11 is whether in fact the plea was voluntary and knowing with an understanding of the charge and the consequences. In fact, the Respondent quotes a paragraph from *Turner v. United States,* 325 F. 2d 988 (C.A. 8, 1964) to that effect (U. S. Br. 17). Significantly, the *Turner* case, and the other authorities used by the Respondent, deal with Rule 11 prior to its amendment. More significant, however, is the paragraph immediately following that quoted by the Respondent. The *Turner* Court went on to define the Government's burden as follows:

> "The Court has a responsibility, of course, to be certain that the reality of voluntariness and understanding exists, but there is no requirement that it must enter a formal finding or recitation to this effect. *Adkins* v. *United States,* supra. The record of the proceedings must indicate with *absolute certainty* that the accused was in a position so to act, and also it must leave *no possible room for doubt* that the Court evaluated and was satisfied that the accused was so acting at the time." *Turner* v. *United States,* 325 F. 2d 988, 990 (C.A. 8, 1964) (Italics ours).

Thus, even before the 1966 Amendment, the dimensions of the burden of the Government had been surveyed and defined. The 1966 Amendment did not reduce that burden, by the Government's own admission, but increased it (cf., U. S. Br. 20). In this case, and with the record made in the District Court, the Government cannot satisfy its burden even as defined in the case which it has cited in its Brief.

CONCLUSION.

With all due deference, and because of the premises, it is respectfully submitted that the judgment be reversed and the cause remanded for further proceedings conformably to law.

Respectfully submitted,

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